Supreme Court, U.S.
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No. 04-1717

In The

Supreme Court of the United States

In re
YORIE VON KAHL,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO DISTRICT JUDGE RALPH ERICKSON

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QUESTIONS PRESENTED

I. WHETHER THIS COURT MUST ISSUE A WRIT OF MANDAMUS WHERE A FEDERAL COURT LACKED AUTHORITY TO SENTENCE PETITIONER UPON OFFENSES FOR WHICH A JURY RETURNED GENERAL VERDICTS OF ACQUITTAL AND FOR WHICH THE JURY ADDITIONALLY RETURNED SPECIAL VERDICTS FOR OFFENSES CLEARLY BEYOND THOSE PERMITTED BY THE CONSTITUTION AND THE RELEVANT STATUTE; BY ITS PLAIN LANGUAGE – AN OFFENSE THAT ALWAYS WAS AND REMAINS AN EXCLUSIVE STATE AND NON-FEDERAL OFFENSE?

II. WHETHER THIS COURT MUST ISSUE A WRIT OF MANDAMUS TO ENFORCE PETITIONER'S RIGHT TO A TRIAL BY JURY WHERE, AS HERE, (1) THE DISTRICT COURT IGNORED GENERAL ACQUITTALS FOR KILLING U.S. MARSHALS WHILE ENGAGED IN THE PERFORMANCE OF THEIR OFFICIAL DUTIES, (2) RELIED UPON A VERDICT FOR AN OFFENSE PUNISHABLE ONLY IN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES BY ADDING ELEMENTS FROM THE ACQUITTED COUNTS AND FROM OUTSIDE THE RECORD TO SUSTAIN JURISDICTION TO IMPOSE A SENTENCE OTHERWISE CLEARLY AND PATENTLY ILLEGAL?

LIST OF PARTIES

The names of all parties appear in the caption of the case. The Petitioner is not a corporation.

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CITATIONS OF OPINIONS AND ORDERS ENTERED BY LOWER COURTS

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United States of America v. Yorie Von Kahl, No. 03-3009 (8th Cir. 2004), order denying rehearing and order for rehearing en banc

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BASIS OF JURISDICTION

This Court has jurisdiction to correct the District Court's fabrication of a verdict without which the Court had no federal jurisdiction and to compel the Court to comply with its prescribed authority as detailed herein and mandated on the face of the record. 28 U.S.C. §§ 1651(a) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the unconstitutional application of 18 U.S.C. §§ 1111 and 1114 in violation of the plain statutory language and the Sixth Amendment of the United States Constitution. Ultimately, the case involves the District Court's sentencing Petitioner to crimes which do

not exist and over which the trial court had no jurisdiction.

GROUNDS FOR ISSUANCE OF WRIT

This petition seeks an order compelling Ralph R. Erickson, District Judge, United States District Court for the District of North Dakota, Southeastern Division, to enforce Petitioner's constitutional rights and vacate the illegal sentences it imposed by (1) enforcing the general verdicts of acquittal returned by the jury, as mandated by Fed.R.Crim.P. 32(b) (1983); and (2) by quashing the verdicts erroneously created by the sentencing judge, declaring them void for usurpation of judicial power.

The sentencing court illegally sentenced Petitioner to four offenses that always were and remain exclusive state and non-federal offenses. To support its sentencing, the trial court erroneously merged elements from general acquittals with elements of special guilty verdicts to sentence Petitioner to life upon an offense over which the federal court had no jurisdiction. By its actions, the trial court ignored the jury's general acquittals for killing United States marshals while engaged in the performance of their official duties and erroneously relied upon a verdict for an offense punishable only in the special maritime and territorial jurisdiction of the United States by adding elements from the acquitted counts and from outside the record for the purpose of sustaining jurisdiction to impose and sustain a sentence otherwise patently illegal.

On a motion to correct the illegal sentences the trial court refused to honor the jury's verdicts, refused to carry

out its ministerial duties mandated by Fed.R.Crim.P. 32(b) (1983), and denied Petitioner his trial by jury, causing Petitioner continuing irreparable harm of which all such acts are *ultra vires*, *coram non judice* and *void ab initio*. (*See* Addendum A) Petitioner has no other remedy to correct the illegal sentences or to enforce the mandates of Fed.R.Crim.P. 32(b) to correct the trial court's illegal sentencing Petitioner to a crime which it created and over which the federal courts have no jurisdiction.

STATEMENT OF THE CASE AND PERTINENT FACTS

This case involves the most extraordinary matter of a federal judge overriding general verdicts of acquittal, engrafting elements from acquitted offenses onto special verdicts thereby illegally creating verdicts never returned by a jury and otherwise non-existent federal offense and jurisdiction.

Petitioner was indicted by a federal grand jury empanelled in the District of North Dakota on March 11, 1983, in an eleven count indictment charging him, in Counts 1 and 2, with the first degree murder of Kenneth M. [sic] Muir in violation of 18 U.S.C. § 1111 and for killing Muir as a U.S. Marshal who was engaged in the performance of his official duties in violation of 18 U.S.C. § 1114 (Count 1), and with the first degree murder of Robert S. Cheshire, Jr. in violation of 18 U.S.C. § 1111 and for killing Cheshire as a deputy U.S. Marshall who was engaged in the performance of his official duties in violation of 18

U.S.C. § 1114 (Count 2.)[1] The counts also cited 18 U.S.C. § 2, but no elements of § 2 were charged in the language of the indictment. (*See* App. at 1-2.)[2]

The United States unequivocally argued in closing arguments that it was trying cases of "murder" of "men just like every other human being." (App. 3-10.) The trial judge instructed the jury on the elements for both first degree murder as defined by 18 U.S.C. § 1111(a) and killing a federal officer while engaged in the performance of his official duties as defined by 18 U.S.C. § 1114. (App. at 11.) The trial judge then instructed upon the elements of first degree murder alone without reference to the offense of killing federal officers. (App. at 12-13.) The trial judge stressed the case was a "trial of a charge of murder" and instructed upon second degree murder as a lesser-included offense of first degree murder. (App. at 13-14.)

The jury returned general verdicts of "not guilty of the offense of first degree murder of Kenneth B. Muir as

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[1] The essential jurisdictional element of the federal offense of murder was never charged – *i.e.*, "within the special maritime and territorial jurisdiction of the United States" – and, in fact, the record disclosed the acts occurred on a state highway upon territory of the State of North Dakota. The jurisdictional element and, hence, the federal murder offense defined and prescribing punishment, *i.e.*, 18 U.S.C. § 1111(b), was never in issue and no part of the proceedings.

[2] Only Counts I and II are relevant to this writ. The additional sentences are not here challenged as illegal. They are only relevant to the extent that they amounted to a total of 15 years. The life sentences, imposed by usurpation of judicial power, in want of subject-matter jurisdiction, without discretion are *coram non judice* and *void*. Hence, the additional 15 year sentence was fully executed on February 12, 1998, and mandatory release pursuant to 18 U.S.C. §§ 4206 and 4161-4162 was due by no later than February 12, 1993. Therefore, irreparable harm is apparent under any circumstance, an additional cause for mandamus relief.

charged in the indictment" on Count One and "not guilty of the offense of first degree murder of Robert S. Cheshire, Jr. as charged in the indictment." (App. at 15-16.) The Presentence Investigation Report (PSI) expressly noted the verdicts were for "second degree murder." (App. at 18-32.)

At sentencing, AUSA Crooks affirmed that the verdicts on Counts One and Two were for "murder." (App. at 33-34.) The District Court sentenced Petitioner to life imprisonment on Count One for second degree murder and for killing a federal officer in violation of 18 U.S.C. §§ 1111, 1114, and again on Count Two for second degree murder and for killing a federal officer in violation of 18 U.S.C. § 1111, 1114 and 2 "as charged in the indictment," (App. at 34-36), followed by sentencing on remaining counts for which the court imposed consecutive to the sentences for Counts One and Two for a total sentence of life plus 10 years plus 5 years. (App. at 34-36.)

On March 18, 2003, Petitioner filed a Rule 35(a) motion to correct the illegal sentences on Counts One and Two asserting that he was acquitted on those counts for both first degree murder and for killing federal officers engaged in the performance of their official duties and only found guilty for second degree murder, an offense which on the face of the record is not a federal offense and for which the District Court lacked jurisdiction to impose any sentence upon those counts whatsoever.[3]

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[3] *See U.S. Department of Justice, Criminal Division, Letter to Ms. Donna R. Evans, Nov. 25, 2003* (Informing Ms. Evans upon referral from President's Office that the instant case is a "State case" with no violation of a "federal statute" and "neither the Attorney General nor the Department [of Justice] has jurisdiction" in respect thereto.) A true

(Continued on following page)

In ruling on the motion, the District Court acknowledged that the "jury found Yorie guilty of two counts of second degree murder," and that the "court imposed two concurrent life terms for the second degree murders." The District Court erroneously held that "[t]he relevant statute, 18 U.S.C. § 1111, allows a court to impose a life sentence on an individual found guilty of second degree murder," ignoring the constitutional and statutory limits of that statute. In doing so, the Court erroneously reasoned that 18 U.S.C. § 1114, which, the court twice erroneously noted, "incorporates the definitions found in 18 U.S.C. § 1111" and "only incorporates the definition and punishment of 18 U.S.C. § 1111," *citing* to "*United States v. Young*, 248 F.3d 260, 274-74 (4th Cir. 2001)," for the wholly irrelevant proposition that "when a federal statute refers to the definition portion of 18 U.S.C. § 1111, it is only referring to subsection (a)." The court also stated that "subsection (b) [18 U.S.C. § 1111] is not incorporated by 18 U.S.C. § 1114." (Addendum A.)

In direct contradiction to the jury's acquittals of the Section 1114 offenses, the District Court decided that "Kenneth Muir and Robert Cheshire were federal officers who were killed while performing their official duties and, therefore, the federal court had jurisdiction to try the case." Finally, the District Court asserted that it could not comprehend the difference between the acquittals in the jury verdict form and the guilty verdicts. While the District Court admitted it recognized the clear language of the acquittal rendered for the offenses of Counts One and Two "as charged in the indictment" and that the guilty verdicts

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and complete letter is attached to the addendum to this writ. (App. at 37.)

returned for second degree murder omitted the all-inclusive language "as charged in the indictment," thereby omitting the elements of § 1114, the court again correctly noted the "verdict form identifies both men by name and states the charge" – *i.e.*, second degree murder only. (Addendum A.)

Unable to find federal "officers" or the "engaged in the performance of official duty" elements from the guilty verdicts, the court simply incorporated an apparent personal belief that "Muir and Cheshire were both officers or employees of the United States engaged in official duties when they were killed," irrespective of the jury's contrary finding, and held as a consequence "the court had jurisdiction over this case" citing to the statutory offense, "18 U.S.C. § 1114," the offense upon which the jury rendered its acquittals. (Addendum A.)

On direct appeal, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's decision, without review or discussion of the jury's verdicts. By relying solely on the District Court's fabricated verdicts of the sentencing and Rule 35(a) judge, the Court of Appeals held "contrary to Kahl's contention, federal jurisdiction supporting the jury verdicts was established, and his conviction and sentences for second degree murder were authorized by 18 U.S.C. § 1111 (maximum life sentence) and § 1114 (conferring federal jurisdiction to punish those who kill United States employees engaged in performance of official duties)."[4] (Addendum B.)

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[4] The opinion did not cite to the verdicts returned by the jury, because no verdicts within the terms of 18 U.S.C. § 1111 were ever returned by the jury. No offense within the terms of 18 U.S.C. § 1111(b) was ever charged or alleged at any time.

Petitioner sought rehearing and rehearing en banc and notified the Court of Appeals of this Court's holding in *Blakely v. Washington*, 542 U.S. ___, ___, 159 L.Ed. 2d 403, 417 (2004), that judicial addition of facts to a jury's verdict is usurpation of "judicial power," and that Petitioner was entitled to the jury's verdicts unchanged by the trial judge. Rehearing and rehearing en banc were denied without discussion. (Addendum B.)

Petitioner filed a petition for a writ of certiorari to this Court on October 24, 2004, which was placed on the Court's docket on December 22, 2004 as No. 04-850. The petition was denied without review on January 24, 2005. (Addendum C.)

Petitioner is without any other adequate or available remedy to compel vacation of the illegal sentences and to enforce the actual terms of the verdicts returned by the jury, and the discharge of Petitioner with judgment entered as mandated by Fed.R.Crim.P. 32(b).

ARGUMENT

I. THE RIGHT TO A WRIT OF MANDAMUS

The writ of mandamus has been traditionally issued "'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will v. United States*, 389 U.S. 90, 94 (1967). "[W]hen a court has no judicial power to do what it purports to do – when its action is not mere error but usurpation of power – the situation falls precisely within" the perimeters of mandamus and the "inquir[y]" turns upon "whether the District Court is empowered to enter the order under attack." *De*

Beers Consolidated Mines v. United States, 325 U.S. 212, 217 (1945). Where the court is "without jurisdiction" of a primary act it is "without authority" of a subsequent act premised thereupon and mandamus will issue to reverse both acts. *Id.*, 325 U.S. at 222-223. *Cf. United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77 (1988) (Where "district court does not have subject-matter jurisdiction over the underlying action . . . process" issued thereupon "is void and an order [punishing]" thereupon "must be reversed"); *Ex parte Fisk*, 113 U.S. 713, 718 (1884) (an "order" issued by court "without jurisdiction, is void, and the order punishing [thereupon] is equally void").

"There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional right to a jury trial," *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 511 (1959); *In re Simmons*, 247 U.S. 231, 240 (1918), to enforce the "rightful fruits" of a jury's verdict denied by a court's "overreach[ing] its judicial power," *Will v. United States, supra*, 389 U.S. at 98-99; *Ex parte United States*, 242 U.S. 27, 51-53 (1916), to reverse an "unwarranted attempt" by a district court "to set aside a judgment it had no jurisdiction to touch," *Delaware, Lackawanna & Western Railroad Co. v. Rellstab*, 276 U.S. 1, 5 (1928), and to compel a lower court to "set . . . aside or quash" an "execution . . . issued" but "not authorized" when such court refuses to do so by motion. *McCargo v. Chapman*, 61 U.S. 555, 557 (1858).

II. THIS COURT HAS THE AUTHORITY TO CORRECT AN ILLEGAL SENTENCE UNDER RULE 35(a)

Rule 35 is merely the codification of the common law rule retaining inherent jurisdiction in a sentencing court to correct illegal sentences imposed and to correct sentences imposed in an illegal manner. *See United States v. Rico*, 902 F.2d 1065, 1067 (2nd Cir. 1990) (delineating history of the Rule). "At common law there were always exceptions to the doctrine that a court lost jurisdiction over its [criminal] judgments . . . with the expiration of the term at which they were entered. These exceptions included . . . a sentence which the judgment did not support." *Rico, supra* at 1067 (*quoting United States v. Bradford*, 194 F.2d 197, 200 (2nd Cir. 1952)). Where the judgment is "void," it is not "final." *DeBenque v. United States*, 85 F.2d 202, 205 (D.C. Cir. 1936).

An "illegal sentence" is among other things a sentence "that the judgment of conviction did not authorize," *Morgan v. United States*, 346 U.S. 502, 506 (1954), or one "not authorized by law." *United States v. Peltier*, 312 F.3d 938, 942 (8th Cir. 2002). The *Peltier* Court noted that sentences are illegal when they are "'in excess of a statutory provision or otherwise contrary to the applicable statute.'" *Id.* Rule 35 is available to review and correct a federal sentence that is "in excess of that prescribed by the relevant statutes," where "multiple terms" are "imposed for the same offense" or where the "terms of the sentence itself" are "legally or constitutionally invalid in any other respect." *Hill v. United States*, 368 U.S. 424, 430, (1962); *Peltier, supra*, at 942. *See also United States v. Rader*, 185 F.Supp. 224, 228 (W.D. Ark. 1960) ("illegality referred to in Rule 35 is apparently one disclosed by the record . . . or in

some way contrary to the applicable statute."), *affirmed*, *Rader v. United States*, 288 F.2d 452 (8th 1961).

Prior to Rule 35, vacating the sentence as well as a plea of guilty, which is a conviction, *Kerchevel v. United States*, 274 U.S. 220, 223 (1927), was approved as within the scope of a court's inherent powers under the then-existing law. *E.g.*, *Basset v. United States*, 76 U.S. 38 (1870). Rule 35(a) merely "continues existing law." Advisory Committee Note to Rule 35 ("The first sentence of the rule continues existing law").

Rule 35(a) is always available "to challenge illegality of the sentence on constitutional grounds," *United States v. Mack*, 494 F.2d 1204, 1207 (9th Cir. 1974), and federal courts of appeals have acknowledged an unquestionable "authority to vacate and correct sentences imposed in violation of constitutional or statutory rights." *United States v. Maples*, 501 F.2d 985, 986-987 (4th Cir. 1974) (*citing United States v. Powell*, 487 F.2d 325 (4th Cir. 1973), and *Dorzynski v. United States*, 418 U.S. 424 (1974)).

III. THE DISTRICT COURT'S DECISION IGNORES THE JURY'S ACQUITTALS OF PETITIONER

> We, the Jury . . . find the defendant Yorie Von Kahl NOT GUILTY of the offense of first degree murder of Kenneth B. Muir as charged in the indictment.
>
> * * *
>
> We, the Jury . . . find the defendant Yorie Von Kahl NOT GUILTY of the offense of first degree murder of Robert S. Cheshire, Jr. as charged in the indictment.

These general verdicts of acquittal "as charged in the indictment" included all elements charged. *Ball v. United States*, 163 U.S. 662, 667-668 (1896) (general verdict of acquittal employing terms "as charged in the indictment" includes all elements in issue); *United States v. Gaudin*, 515 U.S. 506, 515 (1995) ("the jury must find all elements"); *Statler v. United States*, 157 U.S. 277, 279 (1895) ("[T]he verdict must be construed as a whole, not in separate parts"); *Patterson v. United States*, 15 U.S. 221, 225 (1817) ("[W]hether the jury find a general or a special verdict, it is their duty to decide every point in issue").

Indeed, " 'when the question is compounded of law and fact, a general verdict, *ex necessitate*, disposes of the case in hand, both as to law and fact.' " *Gaudin, supra*, 515 U.S. at 514 (*quoting Sparf v. United States*, 156 U.S. 51, 90 (1895)); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977) ("valid judgments of acquittal" "acted to terminate [the] trial"). The acquittals were absolutely final. *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) (" 'We necessarily afford finality to a jury's verdict of acquittal – no matter how erroneous its decision.' ") (*quoting Burk v. United States*, 437 U.S. 1, 16 (1978)).

The jury's verdicts having "terminate[d] [the] trial," *Martin Linen, supra*, and "dispose[d] of the case . . . both as to law and fact," *Gaudin, supra*, the District Court was divested of judicial power and jurisdiction over the offenses "as charged in the indictment" in respects to Counts One and Two. Article III, Section 2, U.S. Constitution (Judicial power extends to "Case"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 338 (1816) ("It is the *case*, and not the *court*, that gives the jurisdiction.") (emphasis by Court).

Upon the acquittals, the District Court was required to discharge Petitioner from the offenses for which he was acquitted in Counts One and Two "as charged in the indictment" and enter judgment accordingly. Fed.R.Crim.P. 32(b) (1983).

IV. THE DISTRICT COURT MISAPPLIED THE SPECIAL GUILTY VERDICTS

The District Court did not acknowledge the acquittals, discharge Petitioner from the accusations and did not enter judgment accordingly. Instead, as the record shows, the sentencing judge "infring[ing] on the province of the jury," *Blakely v. Washington*, 542 U.S. at ___, 159 L.Ed. 2d 403, 417, by "overrid[ing] ... the jurors' independent judgment contrary to the interests of the accused," *Martin Linen*, 430 U.S. at 572, and by "hypothesiz[ing]," created "a guilty verdict that was never in fact rendered." *Sullivan v. Louisiana*, 508 U.S. 275, ___, 124 L.Ed. 2d 182, 189 (1993).

The jury returned additional special verdicts in respect to Counts One and Two. They are clear and unambiguous:

> We, the Jury ... find the defendant Yorie Von Kahl GUILTY of the lesser included offense of second degree murder of Kenneth B. Muir.
>
> * * *
>
> We, the Jury ... find the defendant Yorie Von Kahl GUILTY of the lesser included offense of second degree murder of Robert S. Cheshire, Jr.

There is not, and never has been, a federal offense of second-degree murder without an express jurisdictional element establishing the place of the offense. The federal murder statute expressly defines and confines murder to acts committed "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1111(b). The special maritime and territorial jurisdiction of the United States at the time of the act for which Petitioner was tried is defined at 18 U.S.C. § 7(1)-(5). Section 1111(a) defines the term "murder," but does not define the offense of murder or prescribe any punishment.

The special guilty verdicts as returned by the jury do not contain the elements of § 1111(b) or any other offense defined or made punishable by Congress. Section 1111 "applies only on federal enclaves," *Lewis v. United States*, 523 U.S. 155, 166, 171 (1998), and to permit federal-court jurisdiction the act must "have been committed . . . out of the jurisdiction of any state." *United States v. Bevans*, 16 U.S. 336, 387-89 (1818); *United States v. Wiltberger*, 18 U.S. 76, 94 (1820) (in respect to federal murder or manslaughter the court's "jurisdiction depends on the place in which the fact was committed").[5]

V. THE DISTRICT COURT ILLEGALLY SENTENCED THE PETITIONER UPON A CRIME WHICH IT CREATED AND OVER WHICH IT HAD NO JURISDICTION

The court below held that 18 U.S.C. § 1111 was the "relevant statute." (Addendum A at 3.) Specifically, the court stated, "18 U.S.C. § 1111 allows a court to impose a

[5] *See* Footnote 3, *supra*.

life sentence on an individual found guilty of second degree murder." *Id.* This, as a matter of law, is clearly incorrect.

18 U.S.C § 1111 is the modern codification of the murder statute first enacted by Congress by the Act of April 30, 1790, 1st Sess. II, ch. 9, 1 Stat. 112, 113, known traditionally as the First Crimes Act. *See, e.g., United States v. Lopez*, 514 U.S. 549, 597 n.6 (1995) (Thomas, J., concurring) (discussing sources and limitations of federal criminal jurisdiction); *United States v. Kaiser*, 545 F.2d 467, 477-478 (former 5th Cir. 1977) (Ainsworth, Cir. J., dissenting) (tracing history of § 1111 and noting its limitations to areas within sole and exclusive jurisdiction of the United States).

Although the statute has changed form such as creating degrees, as it eventually passed into Revised Statute § 5339 and incorporated special procedures for charges brought as first degree murder through the Act of January 15, 1897, ch. 29, 29 Stat. 487, the jurisdictional reach and applicability of the federal murder offense has always been and remains special and exclusive, limited by constitutional grants of power and by express legislative terms. *Lewis v. United States*, 523 U.S. 155, 166 (1998) (18 U.S.C. § 1111 is "applicable only on federal enclaves") (emphasis added); *United States v. Bin Laden*, 92 F.Supp.2d 189, 204-215 (S.D.N.Y. 2000) (detailing history and jurisdictional application of § 1111 and dismissing counts because the places the acts occurred were not within "the special maritime and territorial jurisdiction of the United States" as required by the Constitution, § 1111(b) and 18 U.S.C. § 7); *United States v. Gatlin*, 216 F.3d 207, 216-219 (2nd Cir. 2000) (detailing history of federal criminal jurisdiction since the 1790 Act and

particularly the constitutional and statutory limits in respect to federal murder jurisdiction). *See also United States v. Bevans*, 16 U.S. at 387-389 (federal jurisdiction for murder constitutionally requires the act to "have been committed . . . out of the jurisdiction of any state" * * * "the general jurisdiction over the place, subject to this [grant of power] adheres to the territory, as a portion of sovereignty not yet given away"); *People v. Godfrey*, 17 Johns. 225, 232-233 (1819) (same); *United States v. Wiltberger*, 18 U.S. 76, 93-94 (1820) (holding that for murder/manslaughter offenses "jurisdiction of the court depends on the place in which the fact was committed"); *Cohens v. Virginia*, 19 U.S. 264, 426, 5 L.Ed. 257 (1821) ("Congress has . . . no general right to punish murder committed within any of the states."); *Cruikshank v. United States*, 92 U.S. 542, 553, 554 (1875) ("It is no more . . . within the power of the United States to punish for a conspiracy to . . . murder within a state, than it would be to punish for . . . murder itself.").

Without exception, the Constitution and the declarations of the Supreme Court have held that "murder" is not and never has been punishable by Congress and the federal courts unless it has been committed "outside the jurisdiction of the state," and the murder offense prescribed by 18 U.S.C. § 1111 is and remains "applicable only on federal enclaves," *Lewis, supra*, which is specially defined at 18 U.S.C. § 7. *Bin Laden, supra. See United States v. Parker*, 622 F.2d 298, 302-305 (8th Cir. 1980) (place requirements of § 1111(b) are mandatory to permit federal jurisdiction over offense); *United States v. Leight*, 818 F.2d 1297, 1305 (7th Cir. 1987) (exclusive place requirements of statute must be proven beyond reasonable doubt or court loses jurisdiction over offense).

There is no dispute that the acts in this case occurred approximately one mile north of Medina, North Dakota on a state-owned highway and within the jurisdiction of North Dakota. There is no allegation that the acts occurred "within the special maritime and territorial jurisdiction of the United States" as required by § 1111(b) and defined in § 7.

No attempt to prove this jurisdictional element was even made. The critical error of the District Court is that it expressly ignored the acquittals in this case and merged elements from outside the record into its analysis to find the sentencing court had jurisdiction to impose the sentences and, therefore, to hold that the sentences were not "illegal." The District Court additionally excised the plain language of § 1111(b) from the statute to sustain its jurisdiction. Such action by the court is not permissible.

In this bizarre reconstruction of the statute and offenses as returned by the jury, the District Court also relied upon judicial decisions and statutes with no similarity to the statute, facts and circumstances of this case in respect to the counts in issue.

The indictment charged two separate offenses in each of Counts One and Two. Specifically, Count One charged Petitioner with first degree murder of Kenneth M. Muir pursuant to § 1111 and the killing of Muir as a U.S. Marshal engaged in the performance of his official duties. *See* Indictment, Count One.

Count Two charged Petitioner with first degree murder of Robert S. Cheshire, Jr. pursuant to § 1111 and the killing of Cheshire as a deputy U.S. Marshal engaged in the performance of his official duties. *Id.*, Count Two.

The jury returned a general verdict of acquittal on Count One of not guilty of killing Muir "as charged in the indictment." *See* Jury Verdict Form, Count One. The jury returned a general verdict of acquittal on Count Two of not guilty of killing Cheshire "as charged in the indictment." *Id.*, Count Two.

The general verdicts of acquittal were findings against all elements "as charged in the indictment." Thus, the officer and official duty elements were concluded by the fact-finders as not proven. There is no lesser-included offense for killing federal officers engaged in the performance of their official duties. Such officer either is or isn't an officer for purposes of the act; either is or isn't engaged in the performance of the duties of his office; and either is or isn't killed.

Thus, the general verdicts of acquittal disposed of all elements charged in Counts One and Two. The officer/duty elements were thereby disposed of from this case in respect to these two counts. The verdicts of guilty for second degree murder only couldn't possibly include the officer/duty elements, as they were already acquitted from the cases in Counts One and Two. Indeed, the jury verdict form omits them by the acquittals and they are clearly absent from the guilty verdicts. *See Apprendi v. New Jersey*, 530 U.S. 466, 483 & n.10 (2000) (The "limitation on judge's discretion" is determined "according to the facts reflected in the jury verdict form alone" * * * "The judge's role in sentencing is constrained at its outer limits by the facts . . . found by the jury.").

The judge below did not review this claim from the "facts reflected in the jury verdict alone," and clearly ignored both the acquittals and guilty verdicts by reaching

outside the record, in effect overturning the acquittals and adding the acquitted offense of killing federal officers engaged in the performance of their official duties to sustain the sentences which are patently "illegal" and to sustain a factually prohibited jurisdiction.

The acquittals are not subject to challenge for any reason. *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) ("'[W]e necessarily afford absolute finality to a jury's verdict of acquittal – no matter how erroneous its decision'") (*quoting Burk v. United States*, 437 U.S. 1, 16 (1978)); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) ("'[verdict] of acquittal was final and could not be reviewed'") (*quoting Ball v. United States*, 163 U.S. 662, 631 (1896)).

The guilty verdicts for second degree murder only are not open to speculation either. *United States v. Powell*, 469 U.S. 57, 63-64 (1984) (even if it appears that inconsistent verdicts have been returned they are not open to speculation or inquiry – they stand as returned); *United States v. Finch*, 16 F.3d 228, 230-231 (8th Cir. 1994) ("verdicts cannot be upset by speculation or inquiry"); *United States v. Suppenbach*, 1 F.3d 679, 681 (8th Cir. 1993) (same); *United States v. McKinney*, 88 F.3d 118, 120 (2nd Cir. 1996).

Verdicts are the exclusive prerogative of juries, unless jury trial is waived (which it was not in this case), and their findings are conclusive. *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 410 (1947) ("guilt is determined by the jury, not the court"). They do not permit hypothecation after-the-fact by judges and cannot be revised to include elements beyond "the facts reflected in the jury verdict alone." *Apprendi, supra. See also Bollenbach v. United States*, 326 U.S. 607, 614 (1946) ("question

is not whether guilt can be spelt out of the record, but whether guilt has been found by the jury"); *Sullivan v. Louisiana*, 508 U.S. 275, (1993) (Judges are constitutionally prohibited from "hypothesiz[ing] a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be" * * * "appellate speculation about a hypothetical jury's action" is unconstitutional).

Having found that the "relevant statute" in question was "18 U.S.C. § 1111," that such statute permits a "court to impose a life sentence on an individual found guilty of second degree murder," Order, p. 3, and correctly noting that "a jury found [Petitioner] guilty of two counts of second degree murder," *Id.*, p. 1, and that "language on the jury verdict form specifically states that the jury found [Petitioner] guilty of the 'offense of second degree murder of Kenneth B. Muir' and the 'offense of second degree murder of Robert S. Cheshire, Jr.'" The verdict form identifies both men by name and states the charge." *Id.*, p. 4, the judge then hypothesized elements from the acquittal back into the purely second degree verdicts. *Id.*, p. 4, ("Kenneth Muir and Robert Cheshire were federal officers who were killed while performing their official duties" * * * "Muir and Cheshire were both officers or employees of the United States engaged in official duties when they were killed."). The District Court held in light of the hypothesized elements that, "the court had jurisdiction, 18 U.S.C. § 1114, so the judgment is not void." *Id.*, p. 4.

The District Court spent nearly a full page reviewing its perception of the law in respect to its hypothesized verdict. *Id.*, pp. 3-4. It noted that the same act "may constitute an offense against the United States and an offense against a state." As true as this may be, it has no

application to a purely second degree murder offense committed within the jurisdiction of a state and clearly not "within the special maritime and territorial jurisdiction of the United States," as jurisdictionally required by the "relevant statute," 18 U.S.C. § 1111.

Then, again, the District Court adopted the pure dictum from *Logan v. United States*, 144 U.S. 263, 283 (1892), that "Congress has the power to pass laws that 'provide for the punishment of all crimes and offenses against the United States.'" *Id.* Such a statement has no bearing in a case like this where no "crimes and offenses against the United States" were returned by the jury – and, in fact, were resolved by the acquittals.

Continuing, the District Court determined that "[t]he unlawful killing of a federal officer is an offense against the United States, and 18 U.S.C. § 1114 gives federal court's jurisdiction to try those cases." *Id.*, p. 3.

Even if this is absolutely correct, it has nothing to do with the offense of second degree murder and is wholly irrelevant to this case, as the § 1114 offense was resolved by an acquittal and, even if the court had jurisdiction to try the offense, it certainly had no jurisdiction or authority to sentence Petitioner upon acquitted charges.

Then, without any basis from the clear statutory language, the District Court determined that "[f]or the definitions of murder, 18 U.S.C. § 1114 incorporates the definitions found in 18 U.S.C. § 1111. 18 U.S.C. § 1114(1)." Order, p. 3. Here, the District Court made two errors. First, the court relied upon an amended § 1114 statute that did not exist at the time of the instant offenses and, second, the § 1114 statute in existence in February of 1983 incorporated only the punishment section of § 1111 and did

not employ the term "murder" or even refer to the definitional section of § 1111(a). *See* 18 U.S.C. § 1114 (1983). *See also United States v. Brunson*, 549 F.2d 348, 351 (5th Cir. 1977) (§ 1114 prior to amendments "incorporates only the penalty" sections of § 1111 and 1112).

The District Court relied upon *United States v. Young*, 248 F.3d 260, 274-275 (4th Cir. 2001), a case in which the defendant was charged and found guilty of an offense under 18 U.S.C § 924(j). As the Fourth Circuit correctly noted 18 U.S.C. § 924(j) expressly employs the term "murder," expressly refers to the "definition" of "murder (as defined in section 1111)" and provides its own prescribed sentence for the offense. *Young*, therefore, is entirely irrelevant to the case at bar.

In sum, the sentencing judge in this case did not proceed upon the verdicts as returned by the jury. Instead, he manipulated a verdict of his own making by "overrid[ing] . . . the jurors' independent judgment contrary to the interests of the accused," *Martin Linen, supra*, 430 U.S. at 572, extracting the acquitted elements "as charged in the indictment" and adding them to the special guilty verdicts – creating a pseudo-verdict for an offense that no jury ever found and, thereby, created an otherwise non-existent jurisdiction. The guilty verdicts do not identify the "men by name" as United States officers performing official duties and shows no offense within the terms of 18 U.S.C. § 1114 – an offense included within the terms of the general acquittal. *See* 18 U.S.C. § 1114 (1983) ("Whoever kills . . . any United States marshal or deputy marshal . . . shall be punished as provided under sections 1111 and 1112 of this title . . . "; 18 U.S.C. § 1111(b) ("Within the special maritime and territorial jurisdiction of the United States, . . . Whoever is guilty of murder in the second degree shall be imprisoned for any

term of years or for life."); 18 U.S.C. § 7 ("Special maritime and territorial jurisdiction defined") ("Thus the jurisdictional limitation will be preserved in all sections of said chapter 11 describing an offense. . . . the extent of the special jurisdiction as originally enacted has been carefully followed.").

VI. THE DISTRICT COURT'S DECISION VIOLATES BASIC CONSTITUTIONAL PRECEPTS

From the beginning, under the Constitution, "Congress had 'no general right to punish murder committed within any of the States'" and "it was 'clear that Congress cannot punish felonies generally,'" but "could [only] enact such laws for *places* where it enjoyed plenary powers – for instance, over the District of Columbia" because such statutes "have constitutional application *only where Congress had exclusive authority, such as the territories.*" *United States v. Lopez*, 514 U.S. 549 & n.6 (1995) (Thomas, J., concurring).[6] Since on the

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[6] The term "murder" is defined at 18 U.S.C. § 1111(a). The federal *offense of murder* is defined with punishment prescribed at § 1111(b). Notably § 1114 is not a "murder" statute and does not define the "killing" therein to include "malice aforethought" – an essential element of "murder" irrespective of degree. Section 1114 does, however, refer to §§ 1111 and 1112 for punishment. Its text, after defining the offense, states, "shall be punished as provided under sections 1111 and 1112." 18 U.S.C. § 1114 (1983). No punishment is provided under §§ 1111(a) or 1112(a) but only under §§ 1111(b) and 1112(b) both of which expressly confine punishment to acts committed "within the special maritime and territorial jurisdiction of the United States" included as a prepositional phrase within a single sentence. As this Court has previously noted in respect to federal murder and manslaughter offenses, the object of Congress in restraining the jurisdiction of such offenses to expressly defined places "is to limit the operation which the sentence would have without them," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 99-100 (1820), and where "Congress has not made them punishable . . . this Court cannot enlarge the statute." *Id.*, 18 U.S. (5 Wheat.) at 105.

face of the guilty verdicts no offense defined by Congress prescribing punishment of any kind whatever exists under any federal statute, the District Court was left without a "case" depriving it of "judicial power" under Article III, Section 2, without any offense against any law of the United States depriving it of jurisdiction and was left in the same position as it was subject to the acquittals. Fed.R.Crim.P. 32(b) (mandating "discharge" of accused upon acquittal "or for any other reason" creating such "entitle[ment]"). *Blakely v. Washington, supra*, 542 U.S. at ___, 159 L.Ed. 2d at 419 (an accused is "entitled" to "no more" punishment than revealed in jury's verdict – "the facts bearing upon that entitlement must be found by a jury"). *See also Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 94 (1998) ("'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function of the court is that of announcing the fact and dismissing the cause.'") (*quoting Ex parte McCardle*, 7 Wall. 506, 514 (1869)); *Id.*, 523 U.S. at 101-102 ("For a court to pronounce" judgment "when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

Having no "case" or "offense" before it in respect to the two counts, there was nothing to adjudicate and with judicial power wanting the District Court was required to perform its ministerial function "of announcing the fact," *Steel Co., supra*, discharge Petitioner for that reason, Fed.R.Crim.P. 32(b) (1983), enter judgment accordingly, *Id.*, and dismiss Counts One and Two. *Steel Co., supra*.

Instead, as discussed above, the District Court fabricated a verdict never returned by the jury. To borrow and "engraft" elements from an offense never found by the jury to a verdict extra-judicially manufactured for the purpose of permitting or creating jurisdiction is not and never has

been a permissible judicial power. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 94-105 (1820); *cf. Yates v. United States*, 354 U.S. 298, 304-305 (1957). The court's holding that the sentencing court had "jurisdiction over this case," Order, *supra*, p. 4, is based solely upon the court's own creation – *i.e.*, "Muir and Cheshire were both officers or employees of the United States engaged in official duties when they were killed," *Id.*, facts not found in the special guilty verdicts and facts expressly found not to have been proven in the acquittals.

Second-degree murder of Kenneth B. Muir and Robert S. Cheshire, Jr. clearly does not disclose a "case" within the terms of 18 U.S.C. § 1114, and no jurisdiction over a § 1114 offense exists on the face of the verdicts. Hence, the Rule 35(a) court simply repeated the act of usurpation committed by the sentencing court by adding § 1114 elements to the otherwise non-federal verdicts, necessarily overriding the general acquittals, which did in fact acquit the § 1114 offenses, creating a "case" and exercised jurisdiction upon its own creation to sustain the illegal sentences.

Jurisdiction is wanting in any case because § 1114 incorporates the punishment "as provided under sections 1111 and 1112 of this title," 18 U.S.C. § 1114 (1983), and such provision expressly limits such punishment "within the special maritime and territorial jurisdiction of the United States," 18 U.S.C. §§ 1111(b) and 1112(b). The "whole effect" of those words "is to limit the operation which the sentence would have without them." *Wiltberger, supra*, 18 U.S. (5 Wheat.) at 99-100. Where "Congress has not made" the acts "punishable . . . this Court cannot enlarge the statute." *Id.*, 18 U.S. (5 Wheat.) at 105.

Section 1111(b) only authorizes a sentence for second-degree murders committed "within the special maritime and territorial jurisdiction of the United States," language that is part of a sentence and not excisable by the judiciary. For the lower courts to excise this constitutional and legislatively imposed jurisdictional limitation to punishments under § 1111(b) not only usurped the jury's province, it wholly usurps the legislative province as well and exceeds all form of judicial power. *See Lewis, supra*, 523 U.S. at 161, 171 (Section 1111 "applies only on federal enclaves").

> Section 1111(a) defines murder in the first and second degrees. Section 1111(b) specifies the penalties for each of these two types of murder, and limits the reach of Section 1111 to murders committed "within the special maritime and territorial jurisdiction of the United States.". . . . The actual Section 1111, however, includes its own jurisdictional element, viz., 1111(b) – which limits Section 1111 as a whole to murders committed "within the special maritime and territorial jurisdiction of the United States."

Stantini v. United States, 268 F.Supp.2d 168, 181 (S.D.N.Y. 2003) (*quoting United States v. Bin Laden*, 92 F.3d 189, 204-205 (S.D.N.Y. 2000)); *see Bevans*, 16 U.S. at 387-389 (federal jurisdiction over murder requires the act "to have been committed . . . out of the jurisdiction of any state").

Thus, the Court of Appeals, like the Rule 35(a) court and sentencing judge, usurped "judicial power" by "infring[ing] on the province of the jury." *Blakely v. Washington*, 542 U.S. ___, ___, 159 L.Ed. 2d 403, 417; *Martin Linen, supra*, 430 U.S. at 572; *Gaudin, supra*, 515 U.S. at 514-515; *In re Winship*, 397 U.S. 358, 364 (1970). *See also*

Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993) (judicial "hypothesiz[ing]" a "guilty verdict that was never in fact rendered" by the jury is beyond court's judicial power).

All lower courts in fact created (or sustained the creation of) an offense and a jurisdiction which the record itself denied. All such courts refuse to act in accordance with the "independent judgment" of the jury and have replaced such judgment with one of their own devising. All refuse to follow the course prescribed by law.

CONCLUSION

Petitioner requests that a peremptory writ of mandamus issue to Ralph R. Erickson, United States District Judge for the United States District Court for the District of North Dakota, Southeastern Division ordering him to:

(1) Recall his order denying Petitioner's Rule 35(a) motion;

(2) Acknowledge the general acquittals returned by the jury on Counts One and Two as charged in the indictment, discharge Petitioner from said accusations and enter judgment accordingly as mandated by Fed.R.Crim.P. 32(b) (1983);

(3) Vacate the illegal judgments and sentences imposed upon the jury's special verdicts for the non-federal offenses of second-degree murder of Kenneth B. Muir and Robert S. Cheshire, Jr., announce the fact that the district court has no jurisdiction over such facts reflected in the special verdicts, dismiss the cause in respect thereto, discharge Petitioner from such non-federal offenses and

enter judgment accordingly as required by Fed.R.Crim.P. 32(b) (1983);

(4) Order the United States to execute such judgments as required by the jury verdicts immediately and *nunc pro tunc*.

The Order should compel the District Court to enter its judgments and discharges *nunc pro tunc* to reduce the personal injury already caused by its unauthorized action and to restore the status of the parties to that which they were entitled at the time the unlawful and non-jurisdictional acts occurred. *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 261-262 (1908) (actual or threatened personal injury by action "*ultra vires*, and beyond the scope of . . . authority" mandamus will issue to "restore the status of the parties").

Respectfully submitted,

YORIE VON KAHL
Petitioner

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No. _____

In The
Supreme Court of the United States

In re
YORIE VON KAHL,

Petitioner.

APPENDIX TO
PETITION FOR A WRIT OF MANDAMUS
TO DISTRICT JUDGE RALPH ERICKSON

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA)	C3-83-16
-v-)	INDICTMENT
SCOTT FAUL,)	Violation Title 18,
GORDON WENDELL KAHL,)	United States Code,
YORIE VON KAHL,)	Sections 2, 3, 111, 371,
DAVID RONALD BROER, a/k/a)	1071, 1111 and 1114.
DAVID RONALD BREWER,)	(Filed Mar. 11, 1983)
VERNON ALAN WEGNER)	
and JOAN KAHL)	

COUNT ONE

The GRAND JURY charges:

On or about the 13th day of February, 1983, in the District of North Dakota,

SCOTT FAUL,

GORDON WENDELL KAHL and

YORIE VON KAHL,

defendants herein, with premeditation and malice aforethought and by means and use of firearms, did kill Kenneth B. Muir, United States Marshal for the District of North Dakota, while the said Kenneth B. Muir was engaged in the performance of his official duties;

In violation of Title 18, United States Code, Sections 1111, 1114, and 2.

COUNT TWO

The GRAND JURY further charges:

On or about the 13th day of February, 1983, in the District of North Dakota,

SCOTT FAUL,

GORDON WENDELL KAHL and

YORIE VON KAHL,

defendants herein, with premeditation and malice aforethought and by means and use of firearms, did kill Robert S. Cheshire, Jr., Deputy United States Marshal for the District of North Dakota, while the said Robert S. Cheshire, Jr., was engaged in the performance of his official duties;

In violation of Title 18, United States Code, Sections 1111, 1114, and 2.

App. 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

CRIMINAL NO.
C3 83-16

SCOTT FAUL, YORIE VON KAHL, DAVID RONALD BROER, aka David Ronald Brewer, and JOAN KAHL,

Defendants.

TRANSCRIPT

of

PROCEEDINGS

May 27, 1983

8:15 o'clock, A.M.

U. S. District Courthouse
Old Federal Building
Fargo, North Dakota

BEFORE: CHIEF JUDGE PAUL BENSON

* * *

[35] such a sorry end. Two murders, premeditated calulated murders.

There is no serous dispute on the facts of this case, ladies and gentlemen. Look at the photos, remember the testimony, and we are talking here about first degree murder. First and foremost this case is plain, flat out about murder, cold blooded, premeditated murder of two

human beings, using firearms. Of course, only two of the three murderers are here on trial, Scott Faul in the rugby shirt behind me and Yorie Kahl there sitting with his arm on his chair. The evidence is intertwined and you have heard evidence against all of these murderers, Scott Faul, Yorie Kahl and his father Gordon.

Count one, of course, charges that on February 13, 1983 in the District of North Dakota Scott Faul, Gordon Kahl and Yorie Kahl with premeditation and malice aforethought and by means and use of firearms did kill Kenneth B. Muir, United States Marshal for the District of North Dakota while he was engaged in performing his official duties. Is there any dispute about any of that? No, there isn't. The judge I believe will instruct you that the official status of the U. S. Marshal and other law enforcement officers who were with him gives this court its jurisdiction. It's an element that's proved. And they stand by their oath and the conduct that day.

* * *

[39] court reporter's death.

I believe the judge will instruct you there are four essential elements that must be proven against each of the Defendants charged in Counts one and two. I believe he's going to tell you that, number one, it's the killing of a human being unlawfully; secondly, with malice aforethought; third, killing with premeditation, and, fourth, that a person who is a U. S. Marshal or one of his deputies or somebody acting with him, in this case we have a marshal and a deputy, and a U. S. Marshal. The issue is not which bodies contained whose bullets, the issue is these Defendants intended to kill and wound and murder.

Now Count one. Let's look at what Scott Faul did. That Marshal Muir was killed there is no doubt. He was killed unlawfully, he was killed in the performance of his duty. You know that the marshals as a team tried to negotiate Gordon Kahl's surrender and they failed miserably. Gordon Kahl vowed not to be taken alive, shooting resulted and Ken Muir was shot down in cold blood. Ken Muir was killed with malice aforethought. Let's look at the evidence of that on each Defendant. Scott Faul intended to shoot to kill a human being Despite what he says. Didn't have to be Ken Muir. He's a willful participant in the whole action. He fired. Whether he actually struck the heart of Ken Muir is irrelevant because the Government does not have to prove [40] who actually fired the deadly shot. Scott Faul was a willful participant in first degree murder, joined this activity and helped it succeed. And there is support from the witnesses. Look at the trailer house, the Reardons, look at Bradley Kapp, look at Vernon Wegener, Carl Wigglesworth, the empty shell casings Scott Faul admitted he fired. Scott Faul is guilty of willful participation in this case and again whether his bullets actually caused anyone to die is not the point. Faul is one of the murderers three, there isn't any dispute. The premeditation is clear. Deliberation over time, no matter how brief, establishes this charge. Essentially we are talking about killing in cold blood, time to think. Faul helped this venture succeed. He's guilty of willful participation, he's guilty of willful participation in this crime. The official status, as I said, is a give me throughout the case. No one seriously disputes these were U.S. Marshals. Ken Muir was a U.S. Marshal. In his own defense Scott Faul says he retreated. You remember Vernon Wegener took the pointer, took the pointer and he showed you the half moon retreat that Scott Faul was about. That look

like a person who's normally retreating? Of course not. Looks like a regrouping, doesn't it. Looks like a military repositioning. Five shots out of six that Faul fired. We have discovered holes. That probe put those in the RAM Charger. Sixth one, we don't know where it went. Scott Faul

* * *

[43] stands in the same shoes as the person being arrested. In effect he becomes that same arrested party or the one they are seeking. You will have a copy of the judges instructions and you can look them over when you get in the jury room.

The judge is going to instruct you I believe that a third party, like the Defendants in this case, does not have the right to challenge the validity of an arrest warrant that's been issued for someone else. That is, Yorie Kahl and Scott Faul can't challenge the warrant far [sic] Gordon Kahl. That's just a fact. That's the law. I believe the judge will instruct you so in that way. Yorie Kahl himself suggested that he killed no one. The old name on the bullet argument. Well, that just collapses of its own weight. He misses the point of an aiding and abetting. He's a willful participant and it doesn't matter who shot what bullet, he fired with deadly affect and helped the criminal venture succeed and he's just as guilty of killing Ken Muir as the other two murderers.

Turning to the second count of the Indictment, Bob Cheshire's killing. He's a Deputy U. S. Marshal. There is no dispute. That was also with premeditation and malice aforethought. The same evidence applies. There is no doubt at all Scott Faul and Yorie Kahl were willful participants in that murder. Yorie Kahl admitted he fired

that first shot and his target was possibly the man in the white shirt in the

* * *

[58] likely. You can believe that Bob Chesire is dead and you know it. That's the evidence. We don't know would fired first. The evidence is pretty clear that we believe Yorie Kahl fired first.

Now the time I have been speaking to you here, almost an hour, little over a hour, I said a lot about the missing people in this case, about their death and the things that happened out on the road. The death photos that the doctor, Doctor Petty and other doctors used to tell you what happened to those individuals, how they died, the brutalized photos, the stripped of personality photos, they tell one story. Very powerful. It's wrapped up in three words, first degree murder.

But now I have some photographs of the individuals involved in this case who aren't here. Let me put this one up. Ken Muir, Government Exhibit No. 6. Take a look at that one when you get back to the jury room. Said quite a bit about the charge in this case, about the oaths of office, about their authority, who they were. But this is what this case is about, Ken Muir and Bob Chesire. I'll show you him in a minute. Murder in the first degree. This case of murder is about these two human beings. Yes, they worked for the United States Marshal service and that gives us the jurisdiction here. The important thing is that they were men they were men, who were murdered, they had wives and families [59] and children and they had interests and hobbies and they had feelings and abilities and strengths and weaknesses just like every other human being. But at the same time they are unique in the world

and they are not here anymore. Their lives have been snuffed out, extinguished. They flickered away out on the road near Medina.

There is Bob Chesire right next to Ken Muir. You heard Ken's wife, you heard both wives, you heard Ken's wife tell you briefly about her husband of some 30 years, about their children, now mostly grown and their grandchildren, they have six. You heard that Ken was about to retire from the Marshal Service after more than 20 years. He had been a Fargo policeman before that. Here was a man who dedicated his entire life to being a peace officer, a peace officer and now he is no more because of brutal senseless murder at the hands of Scott Faul and Yorie Kahl and Gordon Kahl. They each shot their rifles. They fired with deadly affect. They associated themselves with premeditated murder and they helped it succeed. They were willful participants in a most brutal crime. The Government does not know who shot Marshal Muir. The only witness which we have here is dead. He shot his heart out on the road. Ken Muir can't tell you what happened and that's the tragedy of this case, a human being is dead. It's easy to sit here removed in time and place from this crime and talk about this crime and forget that he

* * *

[165] to rebut points that have been made by the Defendants. I am often tempted during rebuttal arguments to go on for hours literally and I hope that I will be able to resist that temptation.

The Government basically has been accused, and I guess myself personally, have been accused of everything from being an evil person to Ken Muir apparently committing suicide to Bob Chesire apparently being an

irresponsible hooligan and shouting at the top of his lungs over and over an over again that he's going to blow somebody's heads off, and I won't use the other modifying words that counsel seems quite fond of. I guess my initial reaction is I have the greatest difficulty understanding why this is an evil prosecution. We have two dead people, despite what counsel attempted apparently to show during their little demonstration in court, as I gathered it, something to the effect that Bob Chesire isn't really dead because there wasn't enough time to do all the things he was supposed to have done to take in three bullets. Ladies and gentlemen, he's really dead. Those pictures in this album are Bob Chesire and he's dead. And there was time for him to take three fatal shots. Of that you can be absolutely certain. Ken Muir is really dead. He is not going to walk into this courtroom as a surprise witness.

Now I have the greatest difficulty understanding [166] how Ken Muir committed suicide that day which is what Mr. Ramlo has in effect just accused him of doing. Apparently because he didn't plan the thing quite the way Mr. Warren would have planned it who was his immediate predecessor and who he got the job from and who it was very obvious still has a little bit of friction between. I think all of you are aware the Marshal job is a political job, it changes with the party. Mr. Warren went out, Mr. Muir came in. Simple fact is what they forget to point out of Mr. Warren's testimony was hey, I was going to do my job. I was going to arrest Gordon Kahl. That was never an issue with Mr. Warren, that was never an issue with any of these marshals. They are going to do their job just like I'm doing my job. When I have a murder case presented to me, I am going to prosecute it. Now if that makes me an evil man, they I'm sorry. I am going to keep doing my job and if

Mr. Vinje [sic] thinks that's evil and wrong well, then I'm sorry. But the public of the United States pays me to do my job and I intend to continue doing it.

Now counsel has apparently felt that somehow because Ken Muir didn't plan this out quite right so that he died, that he had done something very awfull [sic] to their clients who killed him. Now if that is the logic that these Defendants want you to judge this case by, I have a little trouble understanding what logic is all about. I guess if

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

CRIMINAL NO.
C3 83-16

SCOTT FAUL, YORIE VON KAHL, DAVID RONALD BROER, aka David Ronald Brewer and JOAN KAHL,

Defendants.

INSTRUCTION NO. 15

Title 18, United States Code, Section 1114 provides in pertinent part as follows:

> Whoever kills any . . . United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal . . . or any person assisting him in the execution of his duties . . . while engaged in the performance of his official duties, or on account of the performance of his official duties . . .

shall be guilty of an offense against the United States as defined by the Federal Homicide statute.

The Federal Homicide statute, Title 18, United States Code, Section 1111, provides in pertinent part as follows:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and

premeditated killing . . . , is murder in the first degree.

INSTRUCTION NO. 18

"Malice aforethought" means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.

"Malice" is a state of mind showing a heart that is without regard for the life and safety of others. "Malice" may also be defined as the condition of mind which prompts a person to do willfully, that is, on purpose, without adequate provocation, justification, or excuse, a wrongful act whose foreseeable consequence is death or serious bodily injury to another.

"Malice," as the term is used here, is but another name for a certain state or condition of a person's mind or heart. Since no one can look into the heart or mind of another, the only means of determining whether or not malice existed at the time of a killing is by inference drawn from the surrounding facts and circumstances, as shown by the evidence in the case.

"Premeditation," which is required in addition to malice aforethought in order to establish the offense of first degree murder, is typically associated with murder in cold blood and requires a period of time in which the accused coolly deliberates, or thinks the matter over, before acting. The necessary duration of that period cannot be arbitrarily fixed. The time required to form a

deliberate plan or design varies as the minds and temperaments of human beings differ, and according to the surrounding circumstance in which they may be placed. Any interval of time between the forming of the specific intent to kill, and the execution of that intent, which is of sufficient duration for the accused to be fully conscious and mindful of what he intended willfully to set about to do, is sufficient to justify a finding of premeditation.

In determining whether Kenneth B. Muir and Robert S. Cheshire, Jr., were unlawfully killed with premeditation and malice aforethought, the jury should consider all the facts and circumstances preceding, surrounding and following the killing, as shown by the evidence in the case, which tend to shed light upon the condition of mind and heart of the killer or killers, before and at the time of the deed. No fact, no matter how small, no circumstance, no matter how trivial, which bears upon the question of malice aforethought and premeditation, should escape careful consideration by the jury.

INSTRUCTION NO. 21

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment, whenever such a crime is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the court.

So, if the jury should unanimously find a defendant "Not Guilty" of the crime charged in counts one or two of the indictment, then the jury must proceed to determine

the guilt or innocence of that defendant as to any lesser offense which is necessarily included in the crime charged.

The crime of murder in the first degree, which is charged in counts one and two of the indictment in this case, necessarily includes the lesser included offense of murder in the second degree and a second lesser included offense of voluntary manslaughter.

Therefore, if you unanimously find a defendant named in count one or two of the indictment "Not Guilty" of first degree murder, you should then consider whether the defendant is guilty of the lesser included offense of second degree murder. If you unanimously find a defendant not guilty of either first or second degree murder, you should then consider whether the defendant is guilty of the second lesser included offense of voluntary manslaughter. The same procedure should be followed for each of counts one and two.

INSTRUCTION NO. 23

When, upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt from the evidence in the case that the crime of murder has been committed by a defendant, but has a reasonable doubt as to whether the murder was in the first or in the second degree, the jury should of course give the defendant the benefit of that doubt, and return a verdict of guilty of the lesser included offense of murder in the second degree.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

United States of America,	)	
Plaintiff,	)	
v.	)	Cr. No. C3-83-16
Yorie Von Kahl, et al.,	)	
Defendants.	)	

VERDICT ON THE OFFENSES CHARGED
AGAINST YORIE VON KAHL

(Filed May 28, 1983)

COUNT ONE

OFFENSE CHARGED IN THE INDICTMENT –
FIRST DEGREE MURDER

We, the Jury, duly empaneled and sworn to try the above entitled case, find the defendant Yorie Von Kahl (Guilty or Not Guilty) Not Guilty of the offense of first degree murder of Kenneth B. Muir as charged in the indictment.

(IF YOUR VERDICT IS GUILTY, YOU NEED NOT CONSIDER THE LESSER INCLUDED OFFENSES)

LESSER INCLUDED OFFENSE –
SECOND DEGREE MURDER

We, the Jury, duly empaneled and sworn to try the above entitled case, find the defendant Yorie Von Kahl (Guilty or Not Guilty) Guilty of the lesser included offense of second degree murder of Kenneth B. Muir.

(IF YOUR VERDICT IS GUILTY, YOU NEED NOT CONSIDER THE SECOND LESSER INCLUDED OFFENSE)

SECOND LESSER INCLUDED OFFENSE – VOLUNTARY MANSLAUGHTER

We, the Jury, duly empaneled and sworn to try the above entitled case, find the defendant Yorie Von Kahl (Guilty or Not Guilty) _____ of the second lesser included offense of voluntary manslaughter of Kenneth B. Muir.

COUNT TWO

OFFENSE CHARGED IN THE INDICTMENT – FIRST DEGREE MURDER

We, the Jury, duly empaneled and sworn to try the above entitled case, find the defendant Yorie Von Kahl (Guilty or Not Guilty) Not Guilty of the offense of first degree murder of Robert S. Cheshire, Jr. as charged in the indictment.

(IF YOUR VERDICT IS GUILTY, YOU NEED NOT CONSIDER THE LESSER INCLUDED OFFENSES)

LESSER INCLUDED OFFENSE – SECOND DEGREE MURDER

We, the Jury, duly empaneled and sworn to try the above entitled case, find the defendant Yorie Von Kahl (Guilty or Not Guilty) Guilty of the lesser included offense of second degree murder of Robert S. Cheshire, Jr.

(IF YOUR VERDICT IS GUILTY, YOU NEED NOT CONSIDER THE SECOND LESSER INCLUDED OFFENSE)

SECOND LESSER INCLUDED OFFENSE – VOLUNTARY MANSLAUGHTER

We, the Jury, duly empaneled and sworn to try the above entitled case, find the defendant Yorie Von Kahl (Guilty or Not Guilty) _____ of the second lesser included offense of voluntary manslaughter of Robert S. Cheshire, Jr.

UNITED STATES DISTRICT COURT

NORTH DAKOTA
PRESENTENCE REPORT

NAME (*Last, First, Middle*)				DATE
Kahl, Yorie Von				6-22-83
ADDRESS Clay County Jail Moorhead, MN		LEGAL ADDRESS Route 1 Box 8 Heaton, ND 58450		DOCKET No. C3-83-16-03
				RACE Caucasian
				CITIZENSHIP United States
AGE 23	DATE OF BIRTH 8-12-59	PLACE OF BIRTH Carrington, ND	SEX Male	EDUCATION unknown
MARITAL STATUS Married			DEPENDENTS 3 (2 minor children)	
SOC. SEC. NO. unknown		FBI NO. 727 711 X6	OTHER IDENTIFYING NO.	

OFFENSE 11 Count Indictment, named in 8 Counts
Cts. 1, 2-Murder of Federal Officers & Aiding & Abetting, 18:1111, 1114 & 2
Cts. 5, 6, 7, 8-Assault & Impede Federal Officers, & Law Officers, Aiding & Abetting 18:111, 1114 & 2
Ct. 9-Harbor/concealing a Fugitive, Aiding & Abetting, 18:1071 & 2
Ct. 11-Conspiracy to Assault, 18:371

PENALTY
Cts. 1 & 2 – Imprisonment for any term of years or for life
Cts. 5, 6, 7, 8 – $10,000 fine or 10 years imprisonment or both
Ct.9 – $5,000 fine, 5 year imprisonment or both
Ct. 11 – $10,000 fine or 5 years imprisonment or both

CUSTODIAL STATUS	DATE OF ARREST
Capital Offense, no bond set, in custody since 2-13-83	2-13-83

PLEA
Not Guilty

VERDICT
Jury verdict of guilty on all counts

DETAINERS OR CHARGES PENDING
None

OTHER DEFENDANTS
Gordon Kahl, deceased
Scott Faul, convicted by jury Cts 1, 2, 5, 6, 7, 8, 9, 11 to be sentenced 6-24-83
David Broer, convicted by jury on Cts 9 & 11, to be sentenced 6-24-83
Vernon Wegner, plead guilty to superseding information 4-1-83, to be sentenced 7-1-83

ASSISTANT U.S. ATTORNEY	DEFENSE COUNSEL
Mr. Lynn Crooks Mr. Dennis Fisher	(Court appointed) Mr. Warren Solgard Box 1897 Fargo, ND
DISPOSITION	
SENTENCING JUDGE Paul Benson	DATE 6-24-83

This presentence report has been disclosed to defendant and counsel prior to sentencing. It is a confidential court document which is the property of the United States District Court for the District of North Dakota on loan to the recipient as a confidential bailment. It may not be reproduced or redistributed

without the express approval of the Court and must be returned to the Court when the defendant has been released or when the purpose of the bailment has been otherwise fulfilled.

DO NOT DUPLICATE
Return this report to the Probation Office immediately after sentencing.

OFFENSE:

An eleven count indictment returned 3-11-83 charged on or about 2-13-83 in the District of North Dakota, Scott Faul, Gordon Kahl, Yori Kahl, Joan Kahl, David Broer, and Vernon Wegner, violated Title 18, U.S.C., Sections 2, 3, 111, 371, 1071, 1111, and 1114 to wit: Ct. 1 – Scott Faul, Gordon and Yorie Kahl, murdered Kenneth Muir, a U.S. Marshal, in violation of 18:1111, 1114 and 2; Ct. 2 – Scott Faul, Gordon and Yorie Kahl, murdered Robert S. Cheshire Jr., a Deputy U.S. Marshal in violation of 18:1111, 1114 and 2; Ct. 3 – David Broer, using a dangerous weapon assaulted, resisted and interfered with Kenneth Muir, U.S. Marshal in the performance of his official duties, in violation of 18:111 [sic], 1114, and 3; Ct. 4 – David Broer using a dangerous weapon, assaulted, resisted, impeded and interfered with Robert Cheshire, a Deputy U.S. Marshal in the performance of his duties, in violation of 18:111, 1114 and 2; Ct. 5 – Scott Faul, Gordon and Yorie Kahl, and David Broer, using dangerous weapons assaulted, resisted, intimidated and interfered with James Hopson, a Deputy U.S. Marshal in the performance of his duties, a violation of 18:111, 1114, and 2; Ct. 6 – Scott Faul, Gordon and Yorie Kahl, and David Broer,

using dangerous weapons, assaulted, opposed, impeded and interfered with Carl Wigglesworth, a Deputy U.S. Marshal in the performance of his duties, in violation of 18:111, 1114 and 2; Ct. 7 – Scott Faul, Gordon and Yorie Kahl and David Broer, using dangerous weapons, assaulted, opposed, intimidated and interfered with Stutsman County Deputy Sheriff, Bradley Kapp, who was acting in cooperation with members of the U.S. Marshals Service in the performance of their official duties, in violation of 18:111, 1114, and 2; Ct. 8 – Scott Faul, David Broer, Gordon and Yorie Kahl, using dangerous weapons, assaulted, opposed, impeded, and interfered with City of Medina Police Officer Steven Schnabel, who was acting in cooperation with members of the U.S. Marshals Service, in the performance of their duties, a violation of 18:111, 1114 and 2; Ct. 9 – Scott Faul, David Broer, Vernon Wegner, Joan and Yorie Kahl, harbored and concealed Gordon Kahl, a federal fugitive, in violation of 18:1071 and 2; Ct. 10 – Vernon Wegner, David Broer, and Joan Kahl, knowing that U.S. Marshal Muir and Deputy U.S. Marshal Cheshire were slain in the performance of their duties, assisted Scott Faul and Gordon and Yorie Kahl in order to prevent their apprehension, in violation of 18:3; and Ct. 11 – Scott Faul, David Broer, Vernon Wegner and Joan, Yorie and Gordon Kahl, conspired to interfere with members of the U.S. Marshals Service in the performance of their official duties, specifically, the service of an arrest warrant upon Gordon Kahl, a violation of 18:111.

Of the six defendants, four went to trial. Vernon Wegner, pursuant to a plea agreement with the U.S. Government entered a plea of guilty to a superseding information 4-1-83 of interfering with members of the U.S. Marshals Service in the performance of their official duties, in

violation of 18:111, 1114 and 2. In return for his plea and testimony as a government witness, the government agreed to make no sentencing recommendation, and apprise the sentencing court of Mr. Wegner's cooperation. Gordon Kahl, who escaped capture after the 2-13-83 shootout in Medina, North Dakota, was killed 6-4-83 in a gun battle with police near Walnut Ridge, Arkansas.

Yorie Kahl and Scott Faul were convicted by jury 5-28-83 on two counts of second degree murder, four counts of assault and one count of conspiracy and concealing a person from arrest. Joan Kahl was acquitted while David Broer was convicted of harboring and conspiracy.

Prosecution Version:

The evidence during the trial showed that the factual background of the incident at Medina, North Dakota, began on February 13, 1983, when Bradley Kapp, a Deputy Sheriff for Stutsman County, spotted a vehicle that he believed was owned by a member of the Kahl family. In checking with State Radio Deputy Kapp found that in fact it was a car registered to someone named Kahl and he also learned that there was still an outstanding arrest warrant for Gordon Kahl. After further surveillance of the meeting at Medina in a medical center owned by Dr. Clarence Martin, Deputy Kapp discovered that Gordon Kahl was in attendance at the meeting and was armed with a mini-14 which is a Ruger manufactured rifle that shoots the .223 caliber cartridge, the same round that is commonly used by the military in the M-16 which was prominent in the Viet Nam conflict. Deputy Kapp spotted Kahl in the company of his son, Yorie Kahl, who was also

armed with a mini-14, and in the company of Scott Faul, who also had a mini-14.

Kapp had State Radio contact Deputy U.S. Marshal Robert Cheshire in Bismarck and eventually Cheshire called and spoke by telephone to Bradley Kapp. It was agreed in that telephone conversation that Kapp would keep the Medina Clinic under surveillance until a contingent of the U.S. Marshal Service could arrive at Medina to take Gordon Kahl into custody. At the time there was an outstanding arrest warrant for Gordon Kahl based on charges that Kahl had violated his probation stemming from a conviction on two counts, failing to file his income tax return. The warrant was issued from the United States District Court in Texas. Deputy Marshal Cheshire got Deputy Marshal James Hopson from Bismarck to accompany him to Medina. They travelled in a Dodge Ram Charger truck with Cheshire as the driver. They took with them their handguns and a Marshal Service shotgun and a Marshal Service AR-15 which also shoots the .223 round. Deputy Marshal Cheshire called Fargo and obtained the assistance of United States Marshal Kenneth Muir who in turn enlisted Deputy U.S. Marshal Carl Wigglesworth to assist in the arrest of Gordon Kahl at Medina. Both teams of the Marshal Service converged on Medina in the late

* * *

they were riding in and carried with them mini-14s. Yorie Kahl went to a telephone pole to take cover; Scott Faul went to the edge of the Reardon's trailer house and then into the woods and took cover; and Gordon Kahl, shielded by the Kahl car and the Broer car, stood with his mini-14 and pointed it at the Marshals. Yorie Kahl and Scott Faul also aimed their weapons at the Marshal's Ram Charger.

For more than nine minutes members of the U.S. Marshall Service and those employed to assist the Marshals, tried to talk Gordon Kahl and the others into dropping their weapons. The efforts failed. After nine minutes the shooting started. Yorie Kahl probably fired the first shot. Yorie Kahl's first shot probably hit Bob Cheshire. The first shot to hit Bob Cheshire was a fatal wound. Witnesses agreed that the first shot was followed by a pause, and then there was fifteen or more seconds of intensive firing. During the firing Marshal Muir was killed, Deputy U.S. Marshal James Hopson was wounded, Bradley Kapp was wounded, Steven Schnabel was wounded, Yorie Kahl was wounded, and Robert Cheshire was executed at point blank range by one of the perpetrators, probably Gordon Kahl.

In the aftermath of the shooting those at the scene in the Kahl and Broer vehicles escaped. Before Broer drove Vernon Wegner back to Streeter, North Dakota, Broer handed a pistol belt and an ammo pouch with a gun in it to Wegner and instructed Wegner to hand the weapon to Gordon Kahl. Wegner did as he was told. The wounded were taken to the Medina Medical Clinic where the meeting that preceded the shooting occurred. At the clinic Gordon Kahl showed up carrying two mini-14s and eventually he and Scott Faul drove off in Steven Schnabel's police cruiser, heading north to Harvey, North Dakota, area where they hid for at least a day before they parted company. Scott Faul eventually turned himself in to authorities. In the aftermath of the shooting, five of the six members of the U.S. Marshal Service contingent were dead or wounded. The only unwounded member of the team was Deputy U.S. Marshal Wigglesworth. Medina policeman Schnabel received a flesh wound to the thigh; Stutsman County Deputy Sheriff Kapp had a gun shot

wound to the right hand and Deputy U.S. Marshal Hopson was shot in the head.

Counts 1 and 2 charged Scott Faul, Gordon Kahl and Yorie Kahl with the premeditated murders of the U.S. Marshal Kenneth B. Muir and Deputy U.S. Marshal Robert S. Cheshire Jr. Counts 3 and 4 charged David Broer with forcibly assaulting, impeding, opposing and resisting and interfering with Marshal Muir in Count 3 and Deputy U.S. Marshal Cheshire in Count 4 as they tried to arrest Gordon Kahl. Counts 5 through 8 charged Scott Faul, Gordon Kahl, Yorie Kahl and David Broer with resisting, opposing, impeding, intimidating and interfering with and forcibly assaulting James Hopson, Carl Wigglesworth, Bradley Kapp and Steven Schnabel, respectively. Count 9 charged Scott Faul, Yorie Kahl, David Broer, Vernon Wegner and Joan Kahl with harboring Gordon Kahl, concealing him and helping him evade apprehension. Count 10 charged David Broer with being an accessory after the fact of murders in the case of Marshal Muir and Deputy Marshal Cheshire. In Count 11 Scott Faul, Gordon Kahl, Yorie Kahl, David Broer, Vernon Wegner and Joan Kahl were all accused of conspiring to forcibly assault, resist, oppose, impede, intimidate and interfere with members of the U.S. Marshal Service and other police officers assisting them in the performance of their official duties, specifically in the service of an arrest warrant upon Gordon Kahl.

Only four defendants stood trial. Gordon Kahl was a fugitive throughout the trial. Vernon Wegner pleaded guilty to impeding and resisting and opposing the arrest of Gordon Kahl without a dangerous weapon and testified for the government. Those on trial were Scott Faul, Yorie Kahl, David Broer and Joan Kahl. Joan Kahl was acquitted by

the jury. It is clear that the jury, by its verdicts, chose to believe the government's witnesses, who were strongly supported by other corroborating evidence. At the same time the jury chose to disbelieve the defendants and their testimony as far as those who were convicted are concerned.

The defense statements were carefully tailored to fit the known facts. The defendants attempted to put the U.S. Marshal Service plan to effect the arrest of Gordon Kahl on trial but the defendant's efforts failed. That the Marshals did not carry out their plan well does not mean that the Marshals went to Medina to murder anyone as the defendants would have anyone who will listen believe. The defendants took advantage of a bad plan, bad tactics and they committed murder. And they resisted, opposed and interfered with the arrest of Gordon Kahl. Members of the Marshal's team faced guns for over nine minutes as the State Radio tapes that were introduced during the trial giving the final countdown to these murders very clearly show. The Marshals were not anxious about shooting anyone. There were many witnesses: in the trailer house, bystanders, ambulance crew members, and others, all of whom saw things that support the government's theory of the case. The state Radio tapes, which were played to the jury, are persuasive evidence that these men – members of the United States Marshal Team – who just happened to be government agents, were not out to ambush anyone.

What we have is a senseless, unexplainable tragedy. The U.S. Marshal Service and the members of the team that were out at Medina that day were doing their job, and it was their duty to do that job, and it was their duty that got them killed. They all followed the training that they received in the use of firearms and deadly force. They used

deadly force only as a last resort and the shame of the whole thing is that it came to such a sorry end. Two murdered – cold, calculated murders.

Looking at the evidence against Scott Faul, it is clear that Marshal Muir was killed. There is no doubt. He was killed unlawfully because he was in the performance of his official duties and it is equally clear that the Marshals as a team tried to negotiate Gordon Kahl's surrender. But the evidence showed that Gordon Kahl had vowed not to be taken alive. Shooting resulted and Ken Muir was shot down in cold blood.

Scott Faul intended to shoot to kill a human being. Scott Faul acted on purpose, in disregard of human life. He fired and whether he actually struck the heart of Ken Muir is irrelevant because the government does not have to prove that Scott Faul actually fired the deadly shot. Scott Faul is a willful participant in this murder. Scott Faul is guilty of willful participation. And, again, whether his bullets actually caused Marshal Muir's life to ebb and flicker away is not important. Faul is one of the murders three. Scott Faul in his own defense said he retreated. What he really did is reposition himself and get to a better position. He regrouped, to borrow a military phrase. Five shots out of six that Faul fired went to the Ram Charger. The sixth is unaccounted for. Faul would have had the jury believe that he only meant to scare them down, but the simple truth is that he fired. He was a willful participant in the murderous venture. He intended to shoot. He pointed his weapon and he killed with callous and wontan disregard for human life. It has also been suggested that Scott Faul wanted only to save his own life. That is not a serious argument based on the evidence in this case. Scott Faul had plenty of time to give up and he did no such thing. He

had more than nine minutes to give up. The radio tapes show that he did not give up. In the United States, when the police tell you to throw down your gun, you do it. The ordinary person throws down his gun. But not Scott Faul. Instead, he fired with deadly effect.

Yorie Kahl was also convicted of the murder of Ken Muir. Once again, Yorie Kahl was a willful participant. There was no bullet dug out of Ken Muir's heart with Yorie Kahl's name on it. There simply does not have to be one. He associated himself with the criminal venture of armed resistance to the United States Marshal Service and he fired with deadly effect. The witnesses at the scene saw Yorie Kahl shoot. In fact, Yorie Kahl himself, from his own words, takes credit for possibly taking the first shot. And just like Scott Faul, Yorie Kahl intended to kill a human being. Yorie Kahl acted as a willful participant and in disregard of human life. Yorie Kahl would have had the jury believe that he was just trying to protect his family. But what if everyone protected his family the way Yorie Kahl tried to. If everyone tried to protect his family the way Yorie Kahl tried to, there would be untold carnage. In the United States, people don't go around using deadly force to resist the arrest of a third person or themselves, for that matter. A person has no right to resist a lawful arrest by a federal agent by using deadly force. You cannot simply assist another in evading a lawful arrest. You stand in no better position than the person for whose arrest the warrant is outstanding. A bystander assumes all the risks and responsibilities of the person to be arrested. In effect, the bystander becomes the same as the arrested party. As a footnote, the defense made some efforts to challenge the arrest warrant for Gordon Kahl. But the law is that neither Scott Faul nor Yorie Kahl nor

anyone else who is not Gordon Kahl has the authority to attack the validity of the arrest warrant. The jury, by its verdict, clearly showed that. At the same time, Yorie Kahl suggested that he killed no one. He tried to use the old name-on-the-bullet argument, but he missed the point. The government's theory has always been one of aiding and abetting. Yorie Kahl was a willful participant and it doesn't matter who shot what bullet. He fired with deadly effect and he helped the criminal venture succeed. He is guilty of the murder of U.S. Marshal Ken Muir.

The second count on which the defendants Scott Faul and Yorie Kahl were convicted involved the murder of Deputy U.S. Marshal Bob Cheshire. There is no questions at all that Scott Faul and Yorie Kahl were willful participants in the murder of Bob Cheshire. Yorie Kahl admits that he possibly fired first. His target was the man in the white shirt in the Ram Charger. And that man was Bob Cheshire. Stutsman County Deputy Sheriff Bradley Kapp heard the first shot as it came from the direction of the telephone pole where Yorie Kahl was. Kapp saw the second shot. But in between, during the pause that all the witnesses said they heard, Kapp asked Bob Cheshire if Bob was hurt and, if so, how badly. Cheshire said he was not hit too badly, but Kapp could see blood filling the front of Bob's shirt in the upper chest area. Kapp then saw the second shot from Yorie Kahl and Kapp returned Yorie Kahl's fire. Kapp shot Yorie Kahl. Again, there is no doubt that Yorie Kahl knew he was shooting at a human being. There had been much talk and loud shouting by the Marshals to throw down the guns. The Marshals said it wasn't worth a life. The Marshals said we are U.S. Marshals and have an arrest warrant for Gordon Kahl. The killing was unlawful. Yorie Kahl fired with deadly effect and he is a willful participant

in the murder of Bob Cheshire. But Yorie Kahl insisted that he was justified. But the jury, by its verdict, found that was simply not a reasonable proposition.

The same evidence in Count 1 against Scott Faul applies to Count 2. Scott Faul was a willful participant. He fired with deadly effect at Bob Cheshire. Scott Faul was not trying to scare anyone down. He was trying to shoot someone. And Bob Cheshire is dead.

All of the crimes in the indictment are related. The murders are related to the interference and resistance and opposition of the arrest of Gordon Kahl along with the harboring and the conspiracy to impede and interfere with the Marshal's team. All of the charges, except for the murder charges, deal with what the defendants did to keep Gordon Kahl from being arrested. It is clear from the day's events that the actions of the defendants were successful. And again the government proceeded on the theory that each of the defendants was a willful participant in the interference, opposition and harboring of Gordon

* * *

During the approximate nine minute standoff between law enforcement officers and the defendants, the marshals identified themselves, and stated they were there to arrest Gordon Kahl on a probation violators warrant. The defendants knew Gordon Kahl was wanted on a federal warrant and in an effort to thwart law enforcement surveillance of them at the clinic, engaged in a subterfuge intended to assist Gordon Kahl in avoiding arrest, by switching cars and articles of clothing. Given this kind of premeditated planning, Scott Faul's assertion that he thought the officers were there to arrest him on truancy charges or Mr.

Broer's claim that Gordon Kahl was an acquaintance who he knew little about, nor had he conspired to assist Kahl in alluding arrest, is rather specious. Yorie Kahl knew full well his father's legal status and as the facts show, was prepared to kill to protect his father.

These defendants are atypical criminals who share generally a common agrarian background, middle-class lifestyle but who are nevertheless alienated and disaffected members of society. From the militant Posse Commitatus member, Gordon Kahl, to the passivist, David Broer, the defendants generally share similar religious, political and idealogical values. They express concerns over income taxation, overemphasis of sex education in schools, a preceived erroding of morals and family values and see society becoming more secular and prone to government regulations. Three of the defendants, Gordon Kahl, Scott Faul, and David Broer have each experienced state or federal tax difficulties and fully anticipated further conflict with the authorities stemming from their views that citizens are subjected to unnecessary and excessive legislation, regulations and taxation.

The difference between these defendants and other dissidents is their willingness, in the instant offense, to use violence rather than submit to legal authority. In resisting and assaulting the U.S. Marshals and other law enforcement agents at Medina in 2-13-83, the defendants held themselves above the law and committed cold-blooded-murder. The defendants engaged in what may be termed instrumental violence by using firearms or threatening the use of firearms intended to invoke fear, or intimidate the actions of those in authority. The defendants have developed sophisticated theories involving professed love of county, the Constitution, the Bible, basic education, and

restoration of the family to a position of prominence in society to justify and rationalize the use of armed violence to resist and intimidate legitimate authority. The amount of fire power, the manner in which they dispersed when stopped, the total lethality of their actions demonstrated conclusively not only training and preparation but a recognition by the defendants that they would some day have a confrontation with law enforcement or other governmental authorities.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

CRIMINAL NO.
C3 83-16

SCOTT FAUL, YORIE VON KAHL,
DAVID RONALD BROER, aka
David Ronald Brewer
and JOAN KAHL,

Defendants.

TRANSCRIPT

of

PROCEEDINGS

June 24, 1983

1:30 o'clock P.M.

(Sentencing)

U.S. District Courthouse
Old Federal Building
Fargo, North Dakota

BEFORE: CHIEF JUDGE PAUL BENSON

* * *

[24] sentence for each of these Defendants.

With regard to Yorie Von Kahl there is not even a hint of contrition. The man refused to even talk to the probation officer. We have the statements at trial and those issued to the press and whatnot that this man honestly believes that these murders, cold blooded calculated

murders were justified by some sort of a perverted religious philosophical belief which perhaps wasn't even his, perhaps it was simply that of his father's. This country is not safe for Yorie Von Kahl.

Scott Faul, while there has been some indication of contrition on his part, I think it's fair to say that the contrition really constitutes being simply sorry that it happened, not sorry that he did it. He again admits no guilt, justifies his comments by rationalized self serving delusions that he was being pursued on some sort of a school delinquency charge. His story didn't make sense when it was told to the jury, still doesn't make sense as told to the probation officer. He knew what was happening that day. He knew there was an attempt to allude arrest of Gordon Kahl and he knew why they wanted Gordon Kahl. He didn't start the shooting, Yorie Kahl did, but he joined in within seconds of the first shot being fired. He joined in willingly. He fired deadly volleys. His intent is certainly not seriously disputed. It certainly was not a serious dispute to this

* * *

[32] each of Counts 5, 6, 7 and 8, the term on Counts 5, 6, 7 and 8 to run concurrently with each other but consecutively to the life term. It is further adjudged that he be committed to the custody of the Attorney General of the United States for imprisonment for a period of five years on Count 9 to run consecutively to the life term and to the ten year term. It is further adjudged that he be committed to the custody of the Attorney General of the United States for a term of five years on Count 11 to run concurrently to the other sentence just imposed.

On the verdict of the jury it is adjudged that Defendant, Yorie Von Kahl, be committed to the custody of the Attorney General of the United States – strike that – has been convicted of violations of 18 United States Code Sections 1111, 1114 and 2 as charged in Counts 1 and 2 of the Indictment; that he's been convicted of violation of 18 United States Code Sections 111, 1114 and 2 as charged in Counts 5, 6, 7 and 8 of the Indictment; that he has been convicted of violation of 18 United States Code Sections 1071 and 2 as charged in Count 9 of the Indictment; that he's been convicted of violation of 18 United States Code Section 371 as charged in Count 11 of the Indictment. It is further adjudged that the Defendant, Yorie Von Kahl, be committed to the custody of the Attorney General of the United States for life on Counts 1 and 2, the terms to run concurrently; that [33] he be committed to the custody of the Attorney General of the United States for imprisonment for a term of ten years on each of Counts 5, 6, 7 and 8, which terms will run concurrently but consecutively to the life term. That he be committed to the custody of the Attorney General of the United States for a term of five years on Count 9, term to run consecutively to the ten year term and to the life term; that he be committed to the custody of the Attorney General of the United States for a term of five years on Count 11, the term to run concurrently to the five, ten and life terms.

On the verdict of the jury it is adjudged that Defendant, David Ronald Broer, has been convicted of violation of 18 United States Code Sections 1071 and 2 as charged in Count 9 of the Indictment; that he's been convicted of violation of 18 United States Code Section 371 as charged in Count 11 of the Indictment. It is further adjudged that Defendant, David Ronald Broer, be committed to the

custody of the Attorney General of the United States for a period of five years for imprisonment, for a period of five years on Count 9; that he be committed to the custody of the Attorney General for imprisonment for a period of five years on Count 11 and that these terms will run consecutively.

All of these sentences are imposed under 18 United States Code Section 4205(b)(2). Defendants to be released on parole at such time as is provided by law and as

* * *

[SEAL]

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

November 25, 2003

Ms. Donna R. Evans
245 Liscom Hill Road
McKinley, CA 95519

Dear Ms. Evans:

Thank you for your letter to the President dated August 14, 2003 regarding the release of Yori Von Kahl and Scott Faul. Since the subject of your letter falls within the enforcement interests of the Department of Justice, his staff referred your letter here for response.

Please understand that the Department of Justice can assume jurisdiction only when there has been a possible violation of a federal criminal statute. Your letter refers to a State case, and neither the Attorney General nor the Department has jurisdiction over State cases prosecuted by State and local authorities.

We regret not being able to assist you any further.

Sincerely,

Correspondence Management Staff
Office of Administration

WHB# 334036